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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-232

PETER XAVIER HAINA,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY COMMENTS

This Brief in Opposition to the Petition for Writ of Certiorari is filed pursuant to the request of this Honorable Court dated October 19, 1976.

OPINION BELOW

The Opinion of the Court of Special Appeals of Maryland (Appendix 1a-23a of Petition) is reported in 30 Md. App. 295, 352 A.2d 874 (1976). The denial of the motion for writ of certiorari by the Court of Appeals of

Maryland has not been officially reported to date. However, a denial of review by certiorari was ordered on May 25, 1976.

JURISDICTION

Petitioner has invoked the jurisdiction of this Court pursuant to the provisions of Title 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

Respondent adopts in substance the questions presented by Petitioner.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioner alleges that the Fourth and Fourteenth Amendments to the Constitution of the United States are involved.

STATEMENT

Petitioner Peter Xavier Haina and fourteen other persons were indicted by the Grand Jury of Prince George's County, Maryland in a twenty-one count indictment charging related violations of the controlled dangerous substance laws as codified in Article 27, Sections 276-302, Annotated Code of Maryland (1957, 1976 Repl. Vol.). Petitioner made a pretrial motion to suppress the evidence obtained through the use of a wiretap. Petitioner was tried before a jury on May 19, 1975. At trial, Petitioner renewed his motion to suppress the evidence obtained through the use of a wiretap. Petitioner also sought the suppression of evidence found beneath the porch of the house next door. Both motions were denied. Petitioner was found guilty on six counts of the indictment and sentenced for a total of twenty years.

On appeal to the Court of Special Appeals Petitioner's case was consolidated with that of Clara Strawbridge. Strawbridge, who had shared an apartment with the Petitioner, had also been convicted as a result of the evidence obtained from the wiretap of Petitioner's residence. The affidavit of Detective Blake requested "the use of electronic devices to intercept and record certain narcotic related telephonic communications of Peter Xavier Haina and others yet unknown . . ." (Affidavit, p. 24). No such request was made to intercept the communications of Appellant Strawbridge. In similar fashion, Strawbridge was not identified in the Order signed by Judge James Taylor on July 10, 1974. The Order authorized the interception and recording of "telephonic wire communications of Peter Xavier Haina and other persons yet unknown . . ." (Order, p. 2). The Court of Special Appeals agreed with both Strawbridge and the Petitioner that Strawbridge was a named person, and therefore she should have been named in both the application and order for the wiretap. Her convictions were reversed. However, the Court of Special Appeals held that the failure to name Strawbridge was to no avail to Petitioner, and therefore affirmed his convictions. See Appendix to brief of Petitioner, pages 1a-23a.[1]

In the instant Petition for a writ of certiorari, Petitioner again contends that the wiretap order was invalid even as to Petitioner because of the failure of the application and order to name Petitioner's co-defendant, Strawbridge, as a known person who was committing the offense and whose communications were also intercepted. As a result of the alleged invalid wiretap, Petitioner urges that *all* direct and derivative

[1] All future references to the opinion of the Court of Special Appeals will make reference to the pages in the Appendix to the brief of Petitioner, and shall begin with the letter "A".

evidence obtained through the use of that wiretap should have been excluded, not only as to Strawbridge, but also as to Petitioner.

The Respondent has found no case to support the contentions of the Petitioner. It is submitted that the authorities cited by the Petitioner do not mandate the granting of a writ of certiorari.

ARGUMENT

I.

AN APPLICATION AND ORDER AUTHORIZING ELECTRONIC INTERCEPTION OF TELEPHONE CONVERSATIONS TRANSPIRING IN A RESIDENCE JOINTLY OCCUPIED BY TWO PERSONS WHICH NAMES ONLY ONE PERSON, ALTHOUGH BOTH ARE "KNOWN" PURSUANT TO 18 USC 2518 (1)(b)(iv) and 2518 § (4)(a), RENDERS INADMISSIBLE ONLY THAT EVIDENCE OBTAINED AGAINST THE "KNOWN" BUT UNIDENTIFIED PERSON.

The convictions of Petitioner were obtained primarily through the use of conversations intercepted by a wiretap authorized under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.A. §§ 2510-2520.[2] Section 2518(1)(b)(iv) provides in pertinent part:

> "(1) Each application for an order authorizing the interception of a wire or oral communication . . . shall include the following information:
>
> '(iv) the identity of the person, if known, committing the offense and whose communications are to be interrupted."

Likewise, the actual order authorizing the interception must also specify "the identity of the person, if known, whose communications are to be intercepted . . ." Section 2518(4)(a).

[2] For the sake of brevity, future reference will either be to "Title III" or the "Act".

An issue similar to the issue presented herein by the Petitioner was presented to the Court of Appeals for the Fourth Circuit in *United States v. Bernstein*, 509 F.2d 996 (4th Cir. 1975), *cert. pending*, 421 U.S. 962 (1975). The facts in *Bernstein* reveal that the first intercept order was followed by three extensions. Although Bernstein was "unknown" prior to the period of the original order, probable cause to believe that Bernstein would be heard on a tapped telephone was obtained as a result of the first interception. The District Court found that the failure of the government agents to identify Bernstein in the application for the first extension and subsequent applications rendered the interceptions obtained after the extension unlawful with respect to him. Affirming on appeal, the Court of Appeals concluded:

> "The Act's identification requirements form an integral part of the system Congress created to protect privacy by executive and judicial control of electronic surveillance. Identification of known persons, as required by § 2518(1)(b)(iv), is therefore a statutory precondition to a valid intercept order, and failure to identify renders an interception contrary to law and invalid *as to that person*." (Emphasis supplied) 509 F.2d 1001.

Bernstein appears to specifically limit the invalidity of the order for failure to name a known person to the known person only. The Petitioner was known, and he was specifically named in both the application for the wiretap and the intercept order. It is therefore submitted that the claim of the Petitioner that his convictions should be reversed because Strawbridge was not named in the application for the wiretap or in the intercept order is without merit.

In *United States v. Donovan*, 513 F.2d 337 (6th Cir. 1975), *cert. granted*, 44 L.W. 3471 (U.S. 1976) (No. 75-

212), the District Court held ". . . that the defendants . . . were 'known' to the Government within the meaning of the statute and that failure to include their names in the applications and orders contravenes the statute and necessitates the suppression of the contents of intercepted communications and the evidence derived therefrom *as to these defendants*" (emphasis supplied). At 332. The three defendants in question were among seventeen persons indicted for their participation in illegal gambling activities. Just as in the case at bar, a major portion of the evidence which supported those indictments was gathered pursuant to an order authorizing the interception of wire communications. On appeal, the Court of Appeals "affirm[ed] the order of the District Court granting the motions to suppress by [the three defendants]." At 342. Only the evidence as to the three defendants known but not named in the application and order for the interception was suppressed; the evidence as to the remaining defendants was undisturbed. It is for this same reason that certiorari in the instant case should not be granted. The evidence illegally obtained against Strawbridge by the failure of the State to name co-defendant Strawbridge should have been suppressed as to her alone. Because Strawbridge was the only person who could benefit from the omission according to the holding in *Donovan*, the position of the Petitioner remains unchanged.

United States v. Civella, 533 F.2d 1395 (8th Cir. 1976), *petition for cert. filed*, 45 U.S.L.W. 3135 (U.S. June 14, 1976) (No. 75-1813) involved five defendants. The basic question common to all defendants was based on whether or not the evidence obtained by a wiretap should be suppressed as to the respective defendants. The defendants argued that after a period of time the government had probable cause to believe that several of them were involved in the criminal activity under

investigation. They contended that the failure of the government to identify them in the application and order, after obtaining this knowledge, made the application and order fatally defective because only one defendant, Tousa, was named as the sole interceptee. The Court stated that this argument was clearly "unavailable to Tousa, who was named in the application and order." At 1402. By analogy to the case at bar, this same argument is clearly unavailable to Petitioner because he, like Tousa, had been properly named in both the application for the wiretap and the ensuing intercept order.

Petitioner relies on *Bernstein* and *Donovan* for the proposition that the naming of a known party in a warrant application for electronic eavesdropping is basic to Title III, and that the failure to do so will justify exclusion of evidence seized pursuant to the interception order. This statement is true but incomplete. *Bernstein* and *Donovan* allow exclusion of evidence relating only to the specific party who was known but not identified, but this same legal concept is to no avail to any parties properly named in the application and order. Petitioner, having been properly named in the application and order, can rely neither upon *Bernstein* nor *Donovan* to support his position.

II.

THE COURT OF SPECIAL APPEALS WAS CORRECT IN HOLDING THAT THE STATE HAD FULLY COMPLIED WITH 18 U.S.C. 2518(1)(c).

In further support of his petition, Petitioner also argues to this Court that "[a]n evidentiary hearing, when requested, is the only way to insure full compliance" with Title III, 18 U.S.C. 2518(1)(c) (1970) which provides:

> "(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:
>
> (c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;".

It has been held that:

> "The purpose of the exhaustion requirement is not to foreclose the use of electronic surveillance until the state has exhausted every possible means of obtaining a viable case against the subjects, but merely to inform the authorizing magistrate or judge of the nature and progress of the investigation and the difficulties inherent in the use of normal techniques." *United States v. Lanza*, 356 F. Supp. 27, 30 (N.D. Fla. 1973).

Petitioner states that "[t]he Court of Special Appeals held, 352 A.2d at 882-86, that the trial court was not required to conduct an evidentiary hearing on the state's compliance with this provision" (P. 10). This was neither the issue raised nor the holding of the Court. The Court was responding to Petitioner's second contention, in which the Petitioner argued before the Court of Special Appeals "that the application did not contain a statement as to whether or not other investigative procedures had been tried and failed, or why they appeared unlikely to succeed if tried, or to be too dangerous" (A. 12a). The issue of a hearing was neither raised nor discussed on appeal. The question raised by Petitioner on appeal was limited to the alleged failure of the application to give a full and complete

statement describing the feasibility of other investigative techniques. The Court of Special Appeals was not given an opportunity to consider the question presented in the Petition to *this* Court regarding an alleged lack of an evidentiary hearing.

It was held in *United States v. Pacheco*, 489 F.2d 554, 565 (5th Cir. 1974), *Rehearing and Rehearing En Banc denied*, (March 7, 1974):

> "Finally, we note that the purpose of the requirement in Section 2518(1)(c) is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted, but simply to inform the issuing judge of the difficulties involved in the use of conventional techniques. *United States v. King*, S.C. Cal., 1971, 335 F. Supp. 523, 535; Senate Rep. No. 1097, 1968 U.S. Code Cong. & Admin. News pp. 2112, 2190."

There are numerous other cases which appear to support the position of the Respondent based upon the affidavit of Detective Blake in the instant case. As in the application for most search warrants, it was held in *United States v. James*, 494 F.2d 1007, 1015 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1020, that an "affidavit must be read and interpreted in a commonsense and realistic fashion." Continuing at page 1016, the United States Court of Appeals stated:

> "Considering the matter in a practical and commonsense fashion we find that although the informant had made two purchases of drugs from Jackson it was reasonable to believe that these transactions were only minor items in Jackson's enterprise, and the exposure of his entire operation required different and more sophisticated techniques. Certainly it was clear that surveillance techniques and infiltration would be frustrated by Jackson's extreme caution."

Factually, the affidavit in *James* pertaining to one Lawrence Jackson was very similar to the affidavit pertaining to Petitioner in the case at bar. In *James* the affidavit indicated that Jackson operated under tight security; that he drove in an erratic manner in order to avoid detection by surveillance; and that Jackson would not sell heroin to strangers. Under this set of circumstances, the Court affirmed the convictions holding that the interception of wire communications was the only investigative procedure likely to succeed. The application in the case at bar recited these very same circumstances; enumerated numerous other techniques which had been attempted; and set forth reasons why these other techniques had not been successful (A. 12a-20a).

Other cases, such as *United States v. Bleau*, 363 F. Supp. 438 (D.C. Md. 1973), *aff'd* 509 F.2d 996; *United States v. Staino*, 358 F. Supp. 852 (D.C.C.D. Pa. 1973); *United States v. Falcone*, 364 F. Supp. 877 (D.C.N.J. 1973), *aff'd* 500 F.2d 1399, 1401; and *United States v. Whitaker*, 343 F. Supp. 358 (D.C.E.D. Pa. 1972) *rev'd on other grounds*, 474 F.2d 1246 (3rd Cir. 1973), *cert. denied*, 412 U.S. 950, 953, support Respondent's position that there had been full compliance with both the letter and spirit of Title III, 18 U.S.C. 2518(1)(c). These cases also reinforce the holding of the Court of Special Appeals.

The opinion of the Court of Special Appeals recited portions of the affidavit at length concerning investigative techniques attempted and rejected. The Court stated "we think we have recited sufficient portions to show the lack of a substantial basis for [Petitioner's] argument concerning the feasibility of other investigative techniques" (A. 17a).

In order to ascertain whether there was compliance with the requirements of the Act, an evidentiary hearing is never required and usually not necessary. A judge is capable of determining whether there was compliance with this portion of the Act by reviewing the affidavit.

The affidavit in this case was lengthy and detailed. The Court set out and commented on all of the techniques which Petitioner alleged could have been employed (A. 17a-20a). The Court concluded by saying:

> ". . . it is difficult for us to imagine that the application could have more fully complied with the section of the statute requiring the State to show why other investigative techniques would not succeed" (A. 20a).

Petitioner also contends that "[e]very person who lives in a particular residence and exercises dominion and control over those premises has a constitutional right, under the fourth amendment, against unreasonable and unauthorized intrusions into his home, and that right is infringed not only by violation of his own privacy, but also by improper interference with the privacy of his invitees and fellow residents. *Alderman v. United States*, 394 U.S. 165, 89 S. Ct. 961, 22 L. Ed. 2d 176 (1969)" (P. 7). However, in *Alderman* this Court rejected the petitioner's expansive reading of the Fourth Amendment and of the exclusionary rule fashioned to enforce it. In that case, the defendant had demanded a retrial if any of the evidence used to convict him was the product of unauthorized surveillance regardless of whose Fourth Amendment rights the surveillance violated. This Court held that "[t]here is no necessity to exclude evidence against one defendant in order to protect the rights of another. No rights of the victim of an illegal search are at stake when the evidence is offered against some other party." 394 U.S. 174. As

pointed out in *Alderman* at 180, n.11, however, a "homeowner has the right to expect privacy for himself, his family, and his invitees, and the right to object to the use against him of the fruits of that invasion, not because the rights of others have been violated, but because *his own* were." (Emphasis supplied). In the case at bar, Petitioner was named in the application and order; therefore, none of *his* privacy rights were illegally invaded. *Alderman* also held that evidence admissible against one co-conspirator is not admissible as to another co-conspirator.

III.

FAILURE TO GRANT A PETITIONER, CHARGED WITH A POSSESSORY CRIME, THE AUTOMATIC STANDING REQUIRED BY *JONES v. UNITED STATES* DID NOT DEPRIVE PETITIONER OF DUE PROCESS OF LAW.

Petitioner contends that since the trial court erroneously held that Petitioner lacked standing to object to the admission of evidence procured by the allegedly unlawful search and seizure, the Court of Special Appeals then erred in finding that Petitioner failed "to develop, on the record, facts which would justify suppression of evidence" (P. 11) This deficiency in the record, Petitioner contends "was directly induced by error on the part of the trial judge" (P. 11).

Respondent agrees that Petitioner may have had automatic standing according to *Jones v. United States*, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960), and *Duncan v. State*, 276 Md. 715, 351 A.2d 144 (1976). However, Respondent contends the error, if any, on the part of the trial court in overlooking automatic standing in no way prejudiced the Petitioner.

First, although the trial court did not accept automatic standing, the trial court therefore asked the

question: "Did the defendant [Haina] have a reasonable expectation of privacy as to his neighbor's property?" Had the trial court found automatic standing, Petitioner says he would have been able to argue that he had that expectation. Respondent submits that the trial court openly invited evidence on exactly that issue by virtue of the inquiry directed at the Petitioner. Petitioner freely and voluntarily declined to present any such evidence at his trial, and he should therefore be precluded from ever raising this issue before this Court.

Secondly, a complete evidentiary hearing was held, out of the presence of the jury, whereby Petitioner was given every opportunity to present evidence on the question of the admissibility of the evidence in question. Petitioner and Strawbridge indicated that they wanted a hearing on the validity of the search warrant, pursuant to which they claimed the evidence in question was seized. The trial court held such a hearing on the seizure. Respondent argues that the attorneys and the trial court treated this hearing as including both the standing of Petitioner as well as the merits, *i.e.*, the question of whether the evidence was illegally seized. Most notably, Petitioner's co-defendant, Strawbridge, spoke to both standing and the merits in argument after the evidence was presented.

Petitioner elected his theory of why the evidence against him should have been suppressed. He stated that the items were seized pursuant to a search warrant and that either 1) the search warrant was invalid because of the wiretap or 2) the search warrant, running to the Petitioner's property, could not be used to search neighboring property. Because the finding of the trial court on the standing issue followed the Petitioner's decision not to present evidence, it cannot be said that the deficiency of the record was caused by the finding of the trial court.

Lastly, the record reveals that the green bag in question had been placed under the porch of the adjoining house. The Respondent would submit that one who abandons or discards property cannot later claim that there was an illegal seizure of such property.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

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